Statement of Special Counsel Scott Bloch
U.S. Office of Special Counsel

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Thank you, Mr. Chairman and members of the subcommittee. My name is Scott Bloch and I am the Special Counsel of the U.S. Office of Special Counsel (OSC). I want to thank you for the opportunity to submit my views on the issue of establishing a commission to determine ways to streamline employee appeals.

Nineteenth Century British statesman William Gladstone's adage, "Justice delayed is justice denied" is a truism that applies when process is placed above results and procedures build up over time, through accretion, into a burdensome, Kafkaesque castle that blinds us to our purpose. I have spoken often to my agency of the need for swifter justice. If the appeals process fails to dispense timely justice by having needless layers of review, then our federal employee rights are compromised and people lose faith in the system.

I believe the committee has properly located the questions concerning how to provide timely justice for federal executive employees, and by examining average processing times for various types of complaints alleging prohibited personnel practices and whether there are duplicative or needlessly confusing avenues for relief in the system as it now stands.

OSC is no stranger to these questions on account of the volume of complaints we receive for such a small agency. We receive about 2,000 complaints a year from federal employees alleging Prohibited Personnel Practices. We also operate a secure channel for whistleblowers to make their disclosures directly to us for review and possible referral to the agency for an investigation and receive about 600 disclosures per year. Our Hatch Act Unit

handles about 250 cases annually and gives 3,000 or more advisory opinions to federal agencies to help prevent violations. Finally, our USERRA unit, which protects returning service members' jobs, handles about 200 cases a year now. One important statutory function we serve is to inform the federal workforce and agency manager through our outreach program about prohibited personnel practices, alternative dispute resolution, whistleblower protections, and Hatch Act prohibitions. Through this, we try to dispel misnomers and clear up confusion about rights and avenues for relief.

In the past several years, my agency had a significant backlog of cases, as did many of the other agencies testifying before you on this issue. We asked the very questions this committee is asking. We cut by half or more the processing times for complaints in our screening unit, and we set procedures to have cases that once took two to four years take on average one year or less.

This resulted in our study of the problem, a creation of a new unit, the Special Projects Unit or SPU, to act as a laboratory or study center of new practices, streamlining, and ways of handling claims in a way that was effective in increasing outcomes and delivering justice but also was much quicker. We also commissioned a management consulting firm to do a stem to stern analysis of each function and act that we go through in processing complaints in each of our units. Some of the snake charts, as I called them, resembled the famous Rube Goldberg puzzles or the Byzantine circuits of computer chips.

One of the big discoveries we made through this internal and external study was the ways in which we duplicate efforts that do not add anything to the delivery of due process, and also the ways that bottlenecks occur in the process. Sometimes the bottlenecks are a direct result of something going back through a channel of review multiple times over minor issues. This was a great tool for

learning what works, as well as tapping into employee creativity and innovation.

During this process, when we dusted off old files that had been sitting on shelves for up to three years or more, we found that some claimants or whistleblowers had died, others had simply forgotten they filed anything, and some did not care any longer, or the matter had already been resolved through time or another complaint channel.

I also instituted many new management initiatives and… a lot of old-fashioned elbow grease and through the efforts of our redoubtable staff, we were able to reduce the backlog to a manageable level within one year and eliminate it as of eighteen months into my tenure. As a bonus, we also eliminated within one year a nagging backlog of FOIA requests that had piled up over time, and now we are even efficient in that area that plagues most agencies. Our average processing time for prohibited personnel practice and whistleblower retaliation cases in our screening unit is now down to under forty days. It used to be over six months. We have reduced our average time for prosecution and resolution of claims from over two years to under one year. Our USERRA cases are resolved in approximately six months or less.

We achieved all of these results without compromising quality, and in fact during the backlog effort doubled our finding of positive cases that go for further investigation or prosecution to our IPD unit that prosecutes cases. We also doubled the number of cases in that year that go to agencies for investigation in our whistleblower disclosure unit while eliminating a thorny backlog that had been growing for years.

As you may remember, Mr. Chairman, a bipartisan staff team sent by this committee exhaustively reviewed our backlog reduction procedures last year and, along with yourself and Chairman Davis, had very kind words for our efforts and product.

All of this bears directly on the issue at hand: whether to establish a commission to study ways to improve the federal employee grievance process, and my use of the word grievance here is meant to include all types of complaints subject to review by the agencies testifying here, including EEO complaints, appealable actions, and prohibited personnel practice complaints, as well as grievances under the negotiated procedures.

It is an important project: a well-regulated system to handle complaints and appeals must exist to protect the integrity of government because it ensures that employees receive due process and it ultimately preserves the principles of the merit system.

We are very interested in this idea and would be pleased to participate. Obviously, there will be differences of opinion on the best way to enhance and streamline the ability of federal workers to get relief. But I believe the potential is there for a productive report, and, possibly, legislation.

As has been noted before, the current system can be complex and confusing: jurisdictional overlap means personnel actions can be challenged before multiple bodies that apply different law. The attached flow chart shows how prohibited personnel practice cases are handled by OSC or by employees at the MSPB, and it is divided between original jurisdiction and appellate jurisdiction cases.

Congress has enacted myriad laws and rights for federal executive employees. The system allows employees to take advantage of those laws and to assert their rights. OSC helps to enforce those laws. This mirrors the civil law system in which alternative theories exist and can be pleaded by a plaintiff in court, from civil rights violations, to breach of implied contract, to torts of intentional infliction and so on. Having many rights or even having alternative theories that have differing legal standards is not

something that a new appeals process could change. To change this would require that Congress take away rights.

It would be a mistake to simply jump to the conclusion that a draconian solution is in order: eliminate all perceived complexity by removing alternate avenues for review of personnel actions. There are reasons why the Office of Special Counsel exits, but we do not think that it would be good, for instance, to foreclose the alternative channel for employees to come to OSC or go directly to MSPB if they so choose.

I would point out that the current system does have safeguards intended to prevent inconsistent decisions. For example, by statute, an employee who believes that a personnel action was taken against him because of his whistleblowing must make a binding election among three possible review mechanisms: A grievance; a direct appeal to the MSPB; or a complaint for corrective action before the Office of Special Counsel. A choice of any one of these avenues theoretically forecloses the other two but we need to implement systems to ensure that each agency knows whether another remedy has already been chosen or more than one agency may still end up investigating and adjudicating the same grievance/prohibited personnel practice allegation.

Let us take another example: an action that is pursued to a final grievance decision that is reviewable by the Federal Labor Relations Authority is excluded from MSPB jurisdiction, and conversely, an action that is appealable to the MSPB is excluded from FLRA jurisdiction. Without going into further examples, I would simply observe that the current system is not designed to reach inconsistent decisions.

As to the concern of delayed justice, part of the resolution may lie in enhanced application of streamlined screening procedures. The legal propriety of our Complaints Examining Unit and its winnowing out of cases without merit or jurisdiction was

upheld by the federal courts as sufficient due process investigation. Whether this is achieved by an intake unit as we have, or a show cause hearing, the end result may speed introductory review that separates the good cases, which will receive expedited processing, from the rest, which can also be resolved expeditiously. At least the complaining employees will know sooner rather than later that their cases have been determined not to meet the requirements for further investigation or adjudication.

This too constitutes justice for both the losing party as well as the party with a good claim. Our goal should be to get to the meritorious cases immediately and lessen the drag on their resolution by having to wait in line behind cases without merit.